JD(SF)-11-05
San Diego, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

THE NEIGHBORHOOD HOUSE ASSOCIATION

and **Case 21-CA-36407**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 2028, AFL-CIO

Robert MacKay, Atty., Counsel for the General Counsel,
San Diego, California.
Christopher W. Carlton, Atty.,
Carlton, DiSante & Freudenberger, LLP,
Counsel for Respondent, Irvine, California.

DECISION

I. Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in San Diego, California on December 8, 2004[1] upon a Complaint and Notice of Hearing (the Complaint) issued August 24, by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by the Service Employees International Union, Local 2028, AFL-CIO (the Union.) The Complaint alleges The Neighborhood House Association (Respondent or NHA) violated Sections 8(a)(1) of the National Labor Relations Act (the Act) by unilaterally implementing collective-bargaining proposals when a valid impasse in bargaining did not exist. Respondent essentially denied all allegations of unlawful conduct.

II. Jurisdiction

At all relevant times, Respondent, a California 501(C) (3) non-profit corporation, with principal offices located in San Diego, California and social welfare services facilities and operations located throughout San Diego County, California, has been engaged in the business of providing social welfare services. During a representative 12-month period ending December 31, 2003, Respondent derived gross revenues in excess of $250,000 from its operations and purchased and received at its San Diego County facilities goods, supplies, or materials valued in excess of $50,000, which originated from points outside the State of California. Respondent admits, and I find, it has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is a labor organization within the meaning of Section 2(5) of the Act.[2]

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[1] All dates herein are 2004 unless otherwise specified.

[2] Where not otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

III. Findings of Facts

On March 7, 2003, the Board certified the Union as the exclusive bargaining representative in separate units of "all full-time and regular part-time nonprofessional Head Start employees" and "all full-time and regular part-time professional Head Start employees." Thereafter, in June 2003, the parties commenced collective bargaining over terms and conditions of employment for employees in the two units. In Fall 2003, Respondent received federal approval to allocate monies from an annual federally funded grant to a 2.2% cost of living wage increase (COLA) per employee. Thereafter, the General Counsel issued a complaint alleging Respondent had violated Section 8(a)(5) by conduct related to the annual COLA.

On April 28, Administrative Law Judge, James L. Rose conducted a trial (Judge Rose trial) involving the instant parties.[3] In his decision, issued June 15 (Judge Rose decision), Judge Rose found that Respondent violated Section 8(a)(5) of the Act by unilaterally withholding implementation of a regularly scheduled 2.2% COLA and by conditioning its implementation on the Union's waiving its right to negotiate an addition to the COLA. Judge Rose ordered Respondent to pay its employees in the above units the 2.2% COLA, retroactive to July 1, 2003 with appropriate interest and to post a Notice to Employees. Judge Rose also ordered an extension of the certification year to counteract the impact of Respondent's unfair labor practices on negotiations. The Judge Rose decision is currently pending before the Board on exceptions.

During the course of, and following, the unfair labor practice proceedings that resulted in the Judge Rose decision, the parties continued to engage in collective bargaining, meeting about 25 times between mid-December 2003 and July 3 (the negotiations). Following the Judge Rose trial and through the negotiating session of June 15, Respondent never deviated from its position that the Union had to abandon bargaining for an increase in the COLA amount before Respondent would implement the 2.2% increase. At the negotiating session of June 15, Respondent informed the Union that it was not prepared to make any changes to its proposals. The next day, June 16, Respondent received the Judge Rose decision. Upon receiving the decision, Respondent notified unit employees of its intention to implement the 2.2% increase immediately, stating in a June 17 memorandum to employees, which the Union saw:

> As you may have heard, we received a decision yesterday from an administrative law judge finding that NHA was obligated to implement the 2.2% COLA for the SEIU-represented employees in December 2003. If it were to become final, the judge's recommended order would require NHA to implement the 2.2% COLA retroactive to July 1, 2003, with applicable interest.
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> NHA disagrees with the Administrative Law Judge's decision and recommended order and intends to appeal the ruling. In the meantime, however, NHA will implement the 2.2% COLA retroactive to July 1, 2003. We will make the retroactive payment, with applicable interest, along with regular paychecks issued in July.

[3] Case 21-CA-35986, JD(SF)—46—04, San Diego, CA.

> We are pleased to provide our employees with the 2.2% COLA, which is the amount that the federal government approved and authorized a year ago and the amount that we have been proposing to the Union since July 2003. Unfortunately, NHA has not been able to make this payment because the Union has been insisting on a higher COLA and would not agree to NHA's proposed COLA of 2.2%.[4]

On June 17, Respondent submitted to the Union its "last, best, and final offer," stating in its cover letter that Respondent believed negotiations were at an impasse as no progress had been made in negotiations on various matters, including four significant, unresolved issues:

(1) Whether NHA will pay a COLA for 2003-2004 that exceeds the 2.2% approved by the federal government;
(2) Whether, in addition to paying for full health coverage for employees, NHA will also pay for full health coverage for employees' dependents;
(3) Whether seniority will be one of the factors considered—as opposed to being the sole factor considered—when NHA makes various employment decisions; and
(4) Whether there will be an open or an agency shop at NHA.

Other outstanding bargaining points, Respondent noted, included its proposals on code of conduct, management rights, and vacation and sick leave reduction. At "Proposal O," section 14.7, of its final offer, Respondent proposed, in pertinent part, to grant the 2.2% COLA, as already announced to employees:

By letter dated June 18, the Union answered:

> This letter is written in response to your letter dated June 17, 2004. You correctly note in your letter that SEIU Local 2028 will make a package counter-proposal at our bargaining session on July 1, 2004. Local 2028 expects that NHA would comply with the law by doing more than giving lip service to a bargaining session on July 1, 2004 as well as July 2, 6 and 9, 2004. Your letter, however, makes it clear that you have no intention of seriously considering any counter-proposal we will be making and that you will be implementing your "last, best and final offer" after our bargaining session on July 1, 2004.
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> NHA has already been found to have bargained in bad faith in violation of the Act by Administrative Law Judge James L. Rose…Should NHA fail to bargain in good faith on July 1st or pre-maturely implement its last, best and final offer, Local 2028 will take appropriate legal action.

On July 1, the parties met for bargaining. Referring to the Judge Rose decision, the Union asked when Respondent intended to pay the COLA, and Respondent said it would pay the COLA as set forth in its June 17 memorandum employees to employees. The parties did not otherwise discuss the COLA. The Union presented Respondent with a counterproposal for a "Tentative Agreement." The Union's unchanged proposed COLA was for a three percent

[4] As Counsel for the General Counsel points out, Respondent's assertion that the Union's bargaining intransigence prevented the COLA payment is inaccurate.

increase beginning July 1, 2003. The parties discussed the Union's new healthcare proposal, which would give Respondent three years to achieve full family health coverage with only minor changes in the first year. Respondent agreed to look at the proposals overnight and to meet the following day, July 2.

At the July 2 bargaining meeting, Respondent presented no further proposals, held to its last, best, and final offer, and declared an impasse in negotiations. The parties did not discuss the Union's COLA proposal or the impending 2.2% COLA implementation. On July 3, Respondent implemented the terms of its final offer. In mid July, Respondent paid employees a 2.2% COLA retroactive to July 1, 2003 with interest from December 17, 2003.

IV. Discussion

Respondent initially contends that the General Counsel may not use the Judge Rose decision to establish that Respondent committed unfair labor practices in connection with its past bargaining position on the COLA. In the absence of such evidence, Respondent contends the General Counsel has not shown that any outstanding unfair labor practices exist, which can prevent bargaining impasse. At the hearing, Respondent objected to the admission of the Judge Rose decision as a preclusive or binding finding in this case that Respondent committed an unfair labor practice with respect to the COLA. While noting the decision is not binding until the Board rules on it, I received the decision for background information, i.e. an accurate statement of facts regarding Respondent's actions prior to the Judge Rose hearing.[5] Having reviewed the facts as set forth in the Judge Rose decision, I concur with Judge Rose's conclusion that Respondent's past conduct with regard to the COLA constituted unfair labor practices as set forth in the Judge Rose decision.

Both the General Counsel and Respondent agree that Respondent's July 3 implementation of its last, best, and final offer did not violate the Act if the parties had, prior to implementation, reached a valid impasse. Regarding that issue, the General Counsel takes the position that Respondent could not legally arrive at bargaining impasse in the face of unremedied unfair labor practices. In the General Counsel's view, nothing but the unremedied unfair labor practices tainted an impasse in negotiations. Respondent, on the other hand, contends that a valid impasse can be reached even if outstanding unfair labor practices exist where, as here, Respondent had ceased and substantially remedied its unlawful conduct before declaring impasse.

While it is undisputed that "a lawful impasse cannot be reached in the presence of unremedied unfair labor practices,"[6] the Board recognizes that "not all unremedied unfair labor practices committed during negotiations will give rise to the conclusion that impasse was declared improperly[7]…Only 'serious unremedied unfair labor practices that effect [sic] the negotiations' will taint the asserted impasse."[8] The Board has accepted the court's identification in *Alwin Mfg. Co.,* supra, of two factors to be considered in determining whether an unremedied unfair labor practice has contributed to the parties' inability to reach agreement: (1) whether it

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[5] Respondent does not contend that any of the facts set forth in the Judge Rose decision are incorrect.

[6] *Circuit-Wise, Inc.,* 309 NLRB 905, 918 (1992); *White Oak Coal Co.,* 295 NLRB 567, 568 (1989).

[7] *Titan Tire Corp.,* 333 NLRB 1156, 1158 (2001), citing *Alwin Mfg. Co.,* 326 NLRB 646, 688 (1988), enfd. 192 F.3d 133 (D.C. Cir. 1999).

[8] Ibid, quoting *Noel Corp.,* 315 NLRB 905, 911 (1994).

increased friction at the bargaining table and (2) whether it might "move the baseline for negotiations and alter the parties' expectations about what they can achieve, making it harder for the parties to come to an agreement."[9]

Here, there is no evidence that Respondent's unremedied unfair labor practices increased friction in negotiations. There is also no evidence that Respondent's conduct moved the baseline on bargaining issues and/or altered party expectations. The evidence shows that by at least June 17, Respondent had abandoned its position that it would not "implement a COLA unless and until the parties have reached a complete and final agreement on [the COLA] issue."[10] By designating, in its June 17 letter to the Union, that an outstanding bargaining issue was whether a COLA in excess of the approved 2.2% should be paid, Respondent also clearly indicated its willingness to negotiate that issue with the Union notwithstanding its implementation of the approved amount. By June 18, the Union knew Respondent intended to implement the COLA, and on that date, the Union responded in writing to the Company's final offer. There is no suggestion in the Union's response that the Union believed Respondent was unwilling to negotiate on the subject of an additional COLA amount. The Union accused Respondent of not intending to give more than "lip service" to the next bargaining session scheduled for July 1 and those following. The Union did not, however, assert that Respondent continued to hold an unlawful position, or point out that Respondent's volte-face on COLA-implementation disconcerted the Union in any bargaining stance, or suggest that Respondent's willingness to implement the COLA in any way stymied negotiations. Indeed, the Union did not comment at all on Respondent's projected COLA implementation or on its concession that the related issue of an additional COLA amount remained unresolved. While the Union insisted that Respondent's bad-faith bargaining had tainted all bargaining, it did not explain how.

In spite of Respondent's unlawful conduct as found by Judge Rose, the parties herein engaged in apparently fruitful collective bargaining for more than a year. Although, until June 16, Respondent unlawfully conditioned implementation of the 2.2% COLA on the Union's waiving its right to negotiate an additional COLA, there is no evidence that Respondent's unlawful conduct prevented the parties from arriving at agreement on other matters or played any part in the parties' failure to arrive at agreement on such remaining issues as healthcare coverage, seniority, agency shop, code of conduct, management rights, or vacation and sick leave.

When, on June 17, Respondent presented its final offer to the Union, the Union did not then contend, and there is no evidence, that Respondent's compliance with Judge Rose's Order, or for that matter, its prior unlawful position, altered any party's stance on outstanding bargaining issues, including the Union's .8% additional COLA proposal. Upon receipt of Respondent's final offer, the Union neither pressed for any additional time before addressing the final offer in light of Respondent's partial compliance with Judge Rose's order nor suggested in any way that either Respondent's capitulation on the COLA issue or prior obduracy had affected its bargaining positions. In the Union's July 1 counter-proposal to Respondent's June 17 final offer, the only proposed changes concerned health care provisions, which were unrelated to the COLA issues. While the Union is not required to elucidate how unresolved unfair labor practices impacted its ability to bargain effectively, if such an impact existed, it is reasonable to

[9] *Titan Tire Corp.,* supra at 1158, quoting *Alwin Mfg. Co.,* 192 F.3d 133, 139 (D.C. Cir. 1999).

[10] As reflected in Judge Rose's findings of fact, Respondent so notified the Union by letter dated December 16, 2003, in response to the Union's request that Respondent implement the approved COLA while continuing to negotiate on an additional COLA amount.

expect that the Union would, in some manner, so indicate. The Union did not do so, and I can find no evidence that would permit me to draw any such inference. Contrary to the General Counsel's argument, I find no evidence that Respondent's failure to post a Notice to Employees informing them that it had violated the Act adversely impacted the Union's ability to bargain. In its June 17 memorandum to employees, Respondent essentially informed employees that an Administrative Law Judge had found it had violated the law and that it would obey a significant part of the Judge's order. While agreeing with Counsel for the General Counsel that Respondent falsely told employees on June 17 that the Union was responsible for Respondent's withholding the COLA, I find no evidence that Respondent's misinformation created unwarranted employee dissatisfaction with the Union (which could reasonably be expected to create friction at and away from the bargaining table) or otherwise affected bargaining. Indeed there is no evidence the Union objected to the misinformation or even mentioned it. Consequently, there is no evidence the misinformation undermined the bargaining process.[11]

Section 8(d) of the Act provides that the obligation to bargain in good faith does not compel the bargaining parties to agree to proposals or to make concessions. An employer may bargain to an impasse on mandatory subjects of bargaining and thereafter "lawfully implement proposals reasonably comprehended within those it offered before impasse [citation omitted]." *Telescope Casual Furniture, Inc.,* 326 NLRB 588 (1998); *Rochester Telephone Corp.,* 333 NLRB 30 (2001); *McClatchy Newspapers, Inc.,* 321 NLRB 1386 (1996); enfd. 131 F.3d 1026 (D.C. Cir. 1997); *Tampa Sheet Metal Co.,* 288 NLRB 322 (1988). As delineated by the Board, a genuine impasse exists:

> only where the parties have exhausted all avenues for reaching agreement and there "is no realistic possibility that continuation of discussion at that time would have been fruitful." There is no impasse where one of the parties makes concessions that are not "trivial or meaningless ..." for a concession by either party "on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement." ... The essential question is whether there has been movement sufficient "to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions."

Rochester Telephone, supra, at Fn 3, quoting *Hayward Dodge,* 292 NLRB 434, 468 (1989). While Respondent's unfair labor practices, its post-decision COLA payment, and its post-decision willingness to bargain over an increase to the 2.2% COLA are neither trivial nor meaningless matters, there is no evidence any of those events impacted the Union's bargaining stance. Rather, it appears that the parties' positions were taken without reference to Respondent's outstanding unfair labor practices and that the unresolved bargaining issues as of June 17 existed independent of Respondent's unlawful conduct. The only bargaining issue affected by Respondent's unfair labor practices was the Union's proposed .8% addition to the approved 2.2% COLA. On June 17, after receiving Judge Rose's decision, Respondent withdrew its unlawful obstacle to negotiation of that issue by complying, in pertinent part, with Judge Rose's Order. While the parties did not, thereafter, negotiate concerning the proposed .8% addition, Respondent cannot be blamed for the lack of negotiation. The Union did not seek to revisit the issue, apparently acknowledging that the parties' positions were fixed. Therefore, there is no evidence that Respondent's unfair labor practices had, as of July 2, when Respondent declared impasse, "moved the baseline" on outstanding issues or altered the

[11] The Complaint alleges no violation of 8(a)(5) with regard to the misinformation.

parties' "expectations about what they could achieve" in bargaining. *Alwin Mfg. Co.,* supra. I find no reason to believe that complete resolution of Respondent's unfair labor practices might produce additional bargaining movement by either party. Accordingly, notwithstanding Respondent's unfair labor practices, I find the parties herein had reached valid bargaining impasse on July 2, entitling Respondent to implement its collective-bargaining proposals on July 3.

CONCLUSION

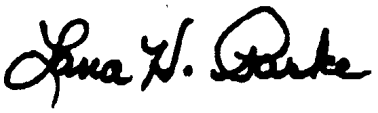
I conclude Respondent did not violate Section 8(a)(5) and (1) of the Act by implementing its collective-bargaining proposals on July 3, 2004. Therefore, I recommend the complaint be dismissed.[12]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The complaint is dismissed.

Dated, San Francisco, California, this 11th day of February, 2005.



Lana H. Parke
Administrative Law Judge

[12] In light of my conclusion herein, I find it unnecessary to hold the case in abeyance until the Board rules on Respondent's exceptions to the Judge Rose decision.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.